BEFORE THE

Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

COMMENTS OF TIME WARNER TELECOM, XO COMMUNICATIONS AND ALLEGIANCE TELECOM

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Time Warner Telecom Corporation, XO Communications, Inc. and Allegiance Telecom, Inc. (collectively, "Joint Commenters"), by their attorneys, hereby submit these comments in response to the Further Notice of Proposed Rulemaking[1] in the above-referenced proceeding.

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1 *Federal-State Joint Board on Universal Service, et al.*, CC Docket No. 96-45, *et al.*, *Further Notice of Proposed Rulemaking and Report and Order*, FCC 02-43 (rel. Feb. 26, 2002) ("NPRM").

I. SUMMARY AND INTRODUCTION

While the Commission states numerous goals for this proceeding, the factor that appears to be truly motivating the Commission is unrelated to universal service *per se* and has led the Commission to seek comment on a connections-based approach to contributions that has virtually no support in either law or sound policy. Specifically, the Commission seems highly focused on alleviating long distance carriers with declining revenues of their obligation to contribute to universal service. The connections-based approach proposed in the NPRM would certainly take care of this problem. Under such an approach, IXCs would have essentially no contribution obligations at all, while carriers like the Joint Commenters would be arbitrarily saddled with vastly increased contribution requirements. The Commission is simply not permitted to adopt it under the relevant statutory provisions and judicial precedent. Moreover, such an approach imposes too many costs and raises too many uncertainties to comport with sound policy.

First, a connections-based approach almost certainly violates the terms of Sections 254(d) and 2(b) of the Communications Act of 1934, as amended ("Act"), and the cases interpreting those provisions. Such an approach would violate the requirement in Section 254(d) that "every" provider of interstate telecommunications service (except *de minimis* contributors) contribute to federal universal service since many substantial providers of interstate service have no end user connections. More importantly, such an approach would violate the requirement that providers of interstate service contribute to universal service on an "equitable and nondiscriminatory basis." Reducing the contribution obligations of the industry segment with the most interstate revenues down close to zero while vastly increasing other carriers' contributions without regard to their share of interstate revenues is not an "equitable and nondiscriminatory" allocation of the burden among providers of interstate service.

Section 2(b) further requires that the Commission not construe its authority over interstate carriers in a manner that results in the regulation of intrastate service where it is feasible to separate the interstate from the intrastate components. A connections-based approach would cause the Commission to impose contribution obligations on intrastate services and facilities where it is clearly possible to avoid this result by using revenues or some other method as the basis for contributions. A connections-based approach like the one discussed in the NPRM therefore violates Section 2(b).

The Commission must also explain why a connections-based approach is somehow different from the per line approach that it rejected in 1997. At that time, the Commission concluded that the "equivalency ratios" required by a per line approach would distort market outcomes and should be avoided. But a connections-based approach suffers from the same defect.

Second, especially when considered in light of the serious legal obstacles presented by a connections-based approach, certain policy factors weigh heavily against adoption. Moving to a connections-based approach would force carriers like the Joint Commenters to incur very significant costs to adjust their internal billing systems to the new regime while at the same time retaining the capability to track revenues for purposes of contributing to state funds as well as other federal programs (*e.g.*, regulatory fees, TRS and number portability). A connections-based approach cannot minimize the time-lag problem. Any such approach that comports with the statute must account for IXC interstate revenue and therefore would be characterized by the same time lag that exists under the current system. Nor is a connections-based approach an appropriate response to other policy concerns raised in the NPRM. Specifically, there is no basis for concluding that overall interstate revenues are declining; IP telephony that can be fairly characterized as an information service is not a significant factor in the marketplace, and unclear regulatory issues surrounding it make it an unsound basis to form universal service policy; and, the Commission has already addressed the problem of assessing contributions on bundled offerings under the existing regime.

Notwithstanding the flaws with this approach, to the extent that the Commission feels compelled to adopt a connections-based method for determining contributions, it must at least ensure that its approach requires all providers of interstate service to contribute on an equitable and nondiscriminatory basis. This could be done many possible ways, each with its own shortcomings. The important point is that the NPRM's approach is not a viable approach and if the Commission feels compelled to adopt a connections-based approach, alternatives must be explored.

Finally, the Commission must not impose further needless mandatory regulations on carrier recovery of universal service contributions from end users. The Joint Commenters do not oppose the adoption of non-mandatory "safe-harbor" language for describing universal service-related changes on customer bills. But otherwise, the Commission's existing truth-in-billing requirements are more than adequate on their own.

II. A CONNECTIONS-BASED APPROACH AS DISCUSSED IN THE NPRM WOULD BE UNLAWFUL AND WOULD NOT ADDRESS MOST OF THE POLICY CONCERNS IDENTIFIED IN THE NPRM.

A. A Connections-Based Approach Raises Several Serious Legal Problems.

A connections-based approach, especially as proposed by the NPRM, is legally flawed in several important respects. As such, it is inconsistent with the Commission's stated goals of ensuring "stability" of the fund and "certainty to market participants." *See* NPRM ¶ 15. Moreover, given that one of the obvious legal defects of the connections-based approach is that it fails to ensure "equitable and nondiscriminatory" contributions, that principle is also affirmatively undermined by a connections-based approach. *See id.*

1. A Connections-Based Approach Would Impermissibly Shift The Bulk Of Universal Service Contribution Obligations Away From Interstate Service Providers.

Section 254 is clear in its charge that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the . . . mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). The proposed connections-based assessment methodology, however, fails to meet this directive by shifting the vast majority of universal service contribution obligations from *interstate* interexchange carriers ("IXCs") to ILECs, CLECs and CMRS carriers by using a methodology that is unrelated to any carrier's relative share of interstate revenues or services.

To begin with, the statute unambiguously requires that "all" providers of interstate telecommunications service contribute to the fund unless their contributions would be *de minimis*. Some significant providers of interstate service, such as resellers, do not provide any end user connections. To comply with the statute, a connections-based approach must include some means of collecting contributions from such carriers. If it does not, the methodology violates Section 254(d).

A connections-based approach would also run afoul of the express terms of Section 254(d) in other ways. Approximately 63 percent of federal universal service contributions are presently derived from the end-user telecommunications revenue of IXCs. NPRM ¶ 59. This should be expected considering that IXCs are the largest carriers of interstate traffic and Congress has directed that federal universal service programs be funded by interstate service providers. However, IXCs provide end user connections to only a small percentage of their customers. Thus, while not explicitly stated in the NPRM, it is clear that the IXCs' collective contribution would dramatically decline (indeed almost completely disappear) under the proposed connections-based methodology discussed in the NPRM. At the same time, the collective contribution of carriers that provide connections to the public switched network, like the Joint Commenters, would increase dramatically.[2]

Shifting the vast majority of federal universal service funding obligations away from the largest providers of interstate service and onto carriers that provide end user connections, without regard to the amount of interstate services they provide, is not "equitable." As the court held in *Texas Office of Pub. Util. Counsel v. FCC*, the language of the statute not only requires nondiscriminatory contributions, but also requires the Commission to consider "the fairness in the allocation of contribution duties." 183 F.3d 393, 434 (5th Cir. 1999) ("*TOPUC*"). The court overturned that part of the Commission's order that failed to consider the balance between the interstate revenues and international revenues of contributors to federal universal service support. The court held that it would be inequitable and in violation of Section 254 to require carriers with only modest interstate revenue to contribute to federal universal service based on combined interstate and international end user revenues. Thus, the court made clear that Section 254(d) requires the Commission to consider not only whether a carrier provides interstate service, but whether carriers are contributing in a manner that is proportionate to their provision of interstate service. Accordingly, requiring carriers like the Joint Commenters to contribute the vast

2 Neither the NPRM nor the *ex parte* proposals project the percentage of federal universal service support that would be contributed by IXCs, the largest carriers of interstate traffic, under the connections-based methodology discussed in the NPRM. Rather, the NPRM estimates that IXCs and LECs will contribute a *combined* 76 percent into federal universal service funds under a connections-based approach. NPRM ¶ 59. The vast majority of this 76 percent will likely be contributed by non-IXCs.

majority of funds to federal universal service without regard to the level of interstate service they provide while dramatically reducing the obligations of the IXCs, the single largest group of interstate service providers, is inequitable and impermissible under Section 254.

The Commission overlooks this mandate in the NPRM, suggesting instead that merely requiring a contribution by every interstate service provider is sufficient under the Act. *See* NPRM ¶¶ 65-67. The Commission tentatively concludes that, because "[c]ontributors competing in the same market segments would be subject to equivalent contribution requirements," a connections-based methodology is equitable and nondiscriminatory. *Id.* ¶ 67. This reasoning completely overlooks the court's mandate in *TOPUC*, which prohibited the imposition of universal service fees on Comsat, notwithstanding the fact that Comsat was contributing at the same rate as some (if not all) of its competitors. The Commission's methodology must provide for equitable and nondiscriminatory treatment, not just nondiscriminatory treatment.

Moreover, the connections-based methodology which imposes a residual obligation on multi-line businesses does not meet the "nondiscriminatory" requirement of Section 254(d). Under the connections-based approach discussed in the NPRM, it is likely that carriers that provide service exclusively or predominantly to multi-line businesses, such as the Joint Commenters, would pay a higher percentage of their revenues into federal universal service funds than would be the case for carriers that serve a larger percentage of residential customers. As the court explained in *TOPUC*, the Commission's rule is discriminatory if it imposes unequal contribution obligations on similarly situated carriers. There the court found that "the FCC's interpretation is 'discriminatory,' because the agency concedes that its rule damages some international carriers like COMSAT more than it harms others." *TOPUC*, 183 F.3d at 435. Similarly, the proposed rule "damages" one class of carriers that provide predominantly multi-line business services, more than it "harms others" that predominantly provide single-line residential and business service.

Nor may the Commission rely on the declining revenues of some IXCs as the basis for shifting contribution obligations onto other industry segments. In *Qwest Corp. v. FCC*, the court explained that "excessive subsidization of universal services by long distance may violate [Section 254, h]owever, *at most* that means that the principles of universal service have to be balanced against the burden on long distance of providing contributions toward universal service." 258 F.3d 1191, 1200 (10th Cir. 2001) (emphasis added). In other words, the solution to high IXC contributions is not a shift in contribution obligations to carriers without regard to interstate revenues, but a reduction in the total amount of universal service funding -- Section 254 requires such an outcome. Thus, the *only* relevant inquiries regarding contributions for universal service contributions under the Act are 1) whether there has been an equitable and nondiscriminatory allocation of responsibilities among all providers of interstate telecommunications services (and possibly also providers of interstate telecommunications);[3] and 2) whether the contribution requirement has become so onerous that it results in unjust, unreasonable, and unaffordable rates for services subject to contribution obligations.[4]

Finally, a regime in which IXCs and other providers of interstate service continue to provide the bulk of the funding for federal universal service support is entirely consistent with Congressional intent. As originally proposed by the Senate version of the 1996 Act, all telecommunications carriers were to contribute to federal and state universal service support on an equitable and nondiscriminatory basis based on the entirety of their revenues (interstate and

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3 *See* 47 U.S.C. § 254(d).

4 *See* 47 U.S.C. § 254(b)(1).

intrastate combined).[5] Congress later narrowed the category of federal contributors in the version of Section 254 ultimately adopted to include only providers of interstate telecommunications services and established a separate provision for the implementation of intrastate universal service support by states. *See* 47 U.S.C. § 254(f). Thus, a two-tiered system was created whereby interstate providers contribute to federal funds and intrastate providers contribute to state funds. The proposed connections-based contribution formula, however, utterly ignores the Congressional mandate by imposing universal services contribution obligations without regard to the amount of interstate or intrastate service provided by a carrier. Indeed, it seems likely that the connections-based approach would cause the same carriers that contribute most to state universal service programs (because local exchange carriers probably provide the bulk of intrastate services) to also contribute the largest share of the money needed for the federal fund. This is not what Congress intended.

2. A Connections-Based Approach Would Impermissibly Impose Universal Service Contribution Obligations On Intrastate Service.

The Commission's authority to adopt a connections-based contribution scheme is also limited by Section 2(b) of the Act and the Fifth Circuit's discussion of that provision in *TOPUC*. Section 2(b) exempts from the Commission's jurisdiction "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). In one brief statement in the NPRM, however, the Commission attempts to sweep away all of the jurisdictional issues that arise under a connections-based approach:

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5 *See* S. Conf. Rep. No. 104-230, at 129 (1996); *see also* S. Rep. No. 104-23, at 94 (1995) (proposing to amend the Act by requiring that "[e]very telecommunications carrier engaged in intrastate, interstate, or foreign communication shall contribute on an equitable and non-discriminatory basis in a manner that is reasonably necessary to preserve and advance universal service.").

> As the Commission previously has concluded, providers of connections to the public switched network are providers of interstate telecommunications service because end-user connections to the public switched network have an interstate component.

NPRM ¶ 65. While the Commission has jurisdiction over the interstate component of connections to the public switched network, it plainly does not have unfettered jurisdiction over that portion of the network used for or in connection with intrastate communications service.

With respect to Section 254, the Fifth Circuit made clear that the Commission lacks authority over intrastate services, and, importantly, it lacks authority to require carriers to contribute to universal service based on intrastate revenue (and intrastate service).[6] The court held that the Commission "cannot use its normally broad regulatory authority to assert what is now only *ancillary* jurisdiction because of the still-intact jurisdictional fence created by § 2(b). . . . § 2(b) still serves as . . . a jurisdictional barrier restricting the agency from using its plenary authority to assert *ancillary* jurisdiction by 'taking intrastate action solely because it further[s] an interstate goal.'" *TOPUC* 183 F.3d 393, 423 (quoting *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (emphasis in original)). The court further explained that "allowing the FCC to assess contributions based on intrastate revenues could certainly affect carriers' business decisions on how much intrastate service to provide or what kind it can afford to provide. This federal influence over intrastate services is precisely the type of intervention that § 2(b) is

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6 *See Texas Office of Pub. Util. Counsel v. FCC,* 183 F.3d 393, 421-424 (5^{th} Cir. 1999) (concluding that the Commission "has no 'unambiguous or straightforward' grant of authority to override the limits set by § 2(b), and, accordingly, it has no jurisdiction to adopt the 'no disconnect' rule . . . . [B]ecause it dictates the circumstances under which local service must be maintained . . . the FCC, by issuing the rule, has acted 'with respect to' and 'in connection with' intrastate service within the meaning of § 2(b)."); *id.* at 446-448 ("the inclusion of intrastate revenues in the calculation of universal service contributions easily constitutes a 'charge . . . in connection with intrastate communication service.'").

designed to prevent." *Id.* at 447, n.101. Simply stated, the Commission lacks jurisdiction to assess universal service contributions based on a carrier's intrastate revenues or services.[7]

Incredibly, the NPRM makes no mention of Section 2(b). The Commission cannot ignore the fact, however, that some part, if not most, of the connections it intends to assess for federal universal service support are used in connection with intrastate service. As such, the Commission must undertake a Section 2(b) analysis and demonstrate that contributions are being assessed solely on the interstate component of that connection. The Supreme Court has made clear that where it is feasible to separate the federal from the state regimes, the Commission must do so.[8] There is, of course, an easy means of doing so here, since the Commission can rely on interstate revenues as the basis for imposing contribution obligations. Therefore, the connections-based approach discussed in the NPRM violates Section 2(b).

3. The Commission Must Explain How The Proposed Connection-Based Contribution Assessment Approach Differs From Previously Rejected Proposals That Were Not Based On Carrier Revenues.

There is nothing new about a connections-based approach for universal service contributions. In 1996, the Commission first sought comment on a per-line approach similar to

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7 *See Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001) ("the FCC may not consider intrastate revenues in assessing a carrier's contribution to the federal universal-service support mechanism.") (citing *TOPUC*).

8 *See Louisiana Pub. Serv. Comn. v. FCC*, 476 US 355, 375 (1986) ("The Communications Act not only establishes dual state and federal regulation of telephone service; it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system. Thus, the Act itself establishes a process designed to resolve what is known as 'jurisdictional separations' matters, by which process it may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service.").

that discussed in the NPRM.[9] Concluding that this and other similar approaches would require the Commission to "adopt and administer difficult 'equivalency ratios' for calculating the contributions of carriers that do not offer services on a per-line [] basis," and that a per-line approach "may favor certain services or providers over others," the Joint Board ultimately opposed such an approach.[10] The Commission subsequently adopted the Joint Board's Recommended Decision, specifically rejecting non-revenues based methodologies because they would be burdensome to administer and would not be competitively neutral.[11]

When an agency proposes a shift in policy, it is well established that it may not "casually ignore its own past decisions" and that "divergence from agency precedent demands an explanation." *Cross-Sound Ferry Servs. Inc. v. ICC*, 873 F.2d 395, 398 (D.C. Cir. 1989) (citations omitted). Further, "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed . . . and if an agency glosses over . . . prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (citations omitted). The NPRM fails to explain why a connections-based approach does not raise the same concerns as the previously proposed and rejected per-line approach.

While the NPRM pays lip service to the fact that per-line fees were previously rejected, it lacks reasoned analysis as to why this new proposal differs from the previously rejected per-line

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9 *See Federal-State Joint Board on Universal Service*, CC Docket. No. 96-45, *Notice of Proposed Rulemaking and Order Establishing Joint Board*, 11 FCC Rcd 18092, ¶ 124 (1996).

10 *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd 87, ¶ 812 (1996) ("Recommended Decision").

11 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, *Report and Order*, ¶ 852 (1997).

approach and why it would be permissible under Section 254. Rather, in one declaratory statement, the Commission pronounces that a connections-based approach "may not require the use of equivalency ratios." NPRM ¶ 44. But this appears to be incorrect.

In the NPRM, the Commission outlines a system whereby "contributions for residential, single-line business, and mobile wireless connections would be assessed on a flat, monthly basis. Contributions for multi-line business connections would be calculated to recover the remaining universal service funding needs, based on the capacity of the connections provided." *Id.* ¶ 16. The NPRM describes a three-tiered approach that would be used to determine assessments for multi-line business connections. *See id.* ¶ 52. First, a base factor is calculated by dividing the residual funding requirement by the total number of multi-line business capacity units reported by all contributors. *Id.* ¶ 52. Depending on the capacity of the connection (the base factor) the base factor is then multiplied by five or by forty to determine the assessment amount. *See id.* ¶ 52. Thus, despite its terse statement that a connections-based assessment would "not require the use of equivalency ratios" in the discussion immediately preceding the description of the tiered approach, the Commission in fact sets forth relevant "equivalency ratios" for multi-line businesses. *Id.* ¶ 44. The Commission must explain how this approach differs from the approaches previously rejected, and, considering its previous determination that non-revenue based assessments would not be competitively neutral, it must explain how this approach will not violate Section 254.

B. A Connections-Based Methodology For Universal Service Solves Few Of The Policy Concerns Discussed In The NPRM.

Contrary to the suggestion in the NPRM, a connections-based approach would actually increase the cost of carrier compliance with universal service contribution obligations. It is also irrelevant to or clearly not the best way of addressing the factors identified by the Commission as threatening the "stability and sufficiency" of the current universal service system. *See id.* ¶ 15.

1. A Connections-Based Methodology Imposes Additional And Substantial Compliance Costs.

A connections-based approach would not "minimize the regulatory costs of complying with universal service obligations." *Id.* ¶ 15. In fact, requiring carriers to track end user connections, including the capacity of a circuit provided to multi-line business users and the associated equivalency ratio for contribution purposes, would be extremely costly. For instance, carriers such as the Joint Commenters likely would be required to develop and deploy entirely new information systems to monitor connections, as well as modifying end-user billing systems to ensure the proper pass through of universal service charges to multi-line business customers. The administrative costs of both modifying existing systems and ongoing monitoring of connections (which in the business environment are routinely changing) outweigh any possible benefits of switching to a connections-based contribution methodology for universal service. *See* Declaration of Steve Ednie in Support of Comments of Time Warner Telecom, XO Communications, Inc. and Allegiance Telecom ("Steve Ednie Declaration") (Attached).

These problems are exacerbated by the fact that the states have generally adopted a revenue-based approach to contributions to state funds. It is not at all clear that the states could or would follow the Commission's lead to adopt a connections-based approach. There is a substantial risk therefore that carriers would be forced to bear the expense of complying with two completely different methodologies for determining universal service contribution obligations at the state and federal levels. The costs of such compliance must be considered in the Commission's analysis of whether to adopt a connections-based approach.

At the same time, carriers will continue to be bound by other requirements which may well compel them to continue to monitor and report their end user revenues to the Commission. Form 499 is presently used to cover the costs for telecommunications relay services, administration of the NANPA, local number portability, as well as universal service. The Commission could not switch to a connections-based approach for all of these programs without initiating separate inquiries. Moreover, if the basis for contributing to these programs were to continue to be revenues, the administrative costs of moving to a connections-based approach solely for universal service must be considered even greater than would otherwise be the case. Such a result would also be contrary to the efforts of the last several years to streamline reporting into a single, efficient form.[12]

A connections-based approach would introduce other unreasonable costs as well. For purposes of multi-line businesses, the NPRM proposes basing a carrier's contribution on the capacity that could be provided by a particular end user connection, rather than the capacity actually used by the customer. *See id.* ¶ 55. Certain CLECs sometimes use a T-1 end user connection to provide a service with a capacity that is in fact significantly smaller than a full T-1 service offering. The Commission's proposed approach would impose contribution obligations

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12 Moving to a uniform connections-based approach for all federal charges and funds is not a simple matter. For example, in its decision to adopt a revenues-based assessment for annual regulatory fees, the Commission concluded that "[a] revenues based allocation will effectively spread the cost recovery burden of the fee requirement in proportion to the benefits realized by those carriers subject to [the Commission's] jurisdiction. . . . Properly administered, a gross revenues methodology will ease administrative burdens of carriers in calculating fee payments, provide reliable and verifiable information upon which to calculate the fee and equitably distribute the fee requirement in a competitively neutral manner." *Assessment and Collection of Regulatory Fees for Fiscal Year 1995, et al.*, MD Docket No. 95-3, *Report and Order*, 10 FCC Rcd 13512, ¶ 134 (1995). It is not at all clear that a connections-based approach to annual regulatory fees would "spread the cost recovery burden of the requirement in preparation to the benefits" of Commission oversight of predominantly interstate activities.

on such services at the same level as full T-1 service offerings. In so doing, the Commission would place an impermissible burden on smaller business customers and their service providers solely because of the network architecture used to provide service, and not on the service actually delivered. Furthermore, in these instances, it would be burdensome to monitor connection as they are added.

2. A Connections-Based Approach Is Not A Panacea For All Universal Service Troubles.

There is a serious disconnect between the problems that the Commission identifies in the NPRM as purported threats to the "stability and sufficiency" of the current universal service system on the one hand and the connections-based approach it proposes as a means of addressing these problems. The Commission is concerned (to say the least) about the possibility of a shrinking contribution base due to a perceived overall decline in the IXCs' end-user switched interstate telecommunications revenues in 2000 and an expected further decline in 2001. As explained above, however, the relevant inquiries under Section 254 are not whether a particular class of carriers has experienced a decline in interstate traffic, but (1) whether the methodology, as applied, is equitable and nondiscriminatory, and (2) whether there has been an overall reduction in interstate revenues among all carriers such that it threatens the continued affordability of services subject to contribution obligations. Indeed, the current revenues-based methodology ensures that, as interstate traffic shifts from one class of carriers to another, the revenue from such traffic is still assessed for federal universal service purposes.

In any event, there is no basis for concern about the level of interstate revenues. The Commission utterly fails to prove that interstate revenues are declining. While the Commission offers particular statistics with respect to some interstate revenues, *see id.* ¶ 8, a mere snap shot of interstate revenue in any given quarter does not reveal the whole picture.[13] In fact, the Commission's own information shows that interstate revenues have not experienced the precipitous decline suggested in the NPRM. The data reveal less than a two percent drop in interstate revenues for universal service contributions from March 2000 to March of 2002.[14] The Commission's own interstate revenue calculations for universal service even show a modest increase in annual interstate revenues from 2000 to 2001.[15] And estimates for the first two quarters of 2002 are on par with the first two quarters of 2001 and 2000.[16]

Though the Commission has the authority to implement comprehensive regulations to implement Section 254, "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious *if that problem does not exist.*" *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (citation omitted) (emphasis added). In this instance, the

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13 The Commission's own evidence is somewhat skewed. The NPRM only cites to IXC reported declines in *consumer* revenue, not total revenue, *see* NPRM ¶ 8, n.12, while the Commission's data of total interstate revenues proves otherwise. *See Telecommunications Industry Revenues 2000*, Industry Analysis Division, Common Carrier Bureau (Jan. 2002) (Table 2 indicates that Interstate and International revenues continue to rise annually, including a 7.6 percent increase in 2000).

14 *See Proposed Second Quarter 2002 Universal Service Contribution Factor*, CC Docket No. 96-45, *Public Notice*, DA 02-562 (rel. Mar. 8, 2002) (estimating fourth quarter 2001 interstate revenues at $19.02 billion); *Proposed Second Quarter 2000 Universal Service Contribution Factor*, CC Docket No. 96-45, *Public Notice*, 15 FCC Rcd 16469 (2000) (estimating fourth quarter 1999 interstate revenues at $19.38 billion).

15 Interstate revenues for 2000 were estimated at $79.5 billion and $79.9 billion for 2001. This information was calculated using the Commission's quarterly estimates of interstate revenues.

16 Average quarterly interstate revenue estimates for 2000, 2001, and the first half of 2002 are $19.87 billion. Quarterly estimates for the first and second quarters of 2002 are $20.25 billion and $19.02 billion, respectively.

Commission's data indicate that adopting a connections-based approach to universal service contributions is a solution searching for a problem.

To the extent the issue in this proceeding is not the decline in interstate revenues, but the migration in interstate revenues away from IXCs, the solution is better enforcement of the Commission's requirements rather than a complete rejection of the present system. For instance, if interstate traffic (and the revenues associated with it) is shifting from traditional IXCs to ILECs as a result of Section 271, the Commission must take steps to ensure the ILECs are paying a proportionate amount. Furthermore, if, as the Commission suggests, demand for certain interstate services has shifted to CMRS providers, the CMRS safe harbor may need to be revisited.

Nor can the Commission rely on a connections-based approach as a means of addressing the time lag between the collection and assessment of contributions. To begin with, the Commission has gone a long way toward addressing this problem under the current regime. At the request of IXCs, only one year ago, the Commission reduced the delay between collection and assessment of universal service contributions from twelve months to six months. It reasoned that "the revised methodology will improve upon the existing methodology by basing assessments on revenue data that are more reflective of current market conditions. As a result, the revised contribution methodology will prevent the possibility that certain carriers [IXCs] will be at a competitive disadvantage as market conditions change."[17] Rejecting this system before it has had time to prove its worth would be capricious decision making.

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17 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order and Order on Reconsideration*, 16 FCC Rcd 5748, ¶ 2 (2001) ("Contribution Interval Order").

The time lag problems the Commission hopes to resolve completely through its proposal is a result of the volatility of the IXC market. This volatility, however, ultimately is inescapable if IXCs participate in universal service funding (as Congress has directed). Therefore, the interstate services market must be accepted as it is and dealt with in a reasonable manner -- as was done last year by reducing the reporting and collection interval.

At this time, other alternatives designed to address the volatility of IXC revenues would be bad policy. For example, monthly reporting is not a viable option. *See* NPRM ¶¶ 76-79. While a monthly report and assess form may address IXC concerns about the time between accrual and assessment of revenues, the proposal would require the universal service administrator to establish quarterly contribution factors based on a prediction of the capacity deployed to multi-line businesses as opposed to carriers' actual revenues (or connections for that matter). *See id.* ¶ 78. Such an approach unnecessarily conflicts with a basic tenet of Section 254, namely, that the Commission ensure "specific, predictable, and sufficient" universal service funding. 47 U.S.C. § 254(b)(5).

Also, additional filing requirements would serve only to increase the burdens on carriers and the universal service administrator, while providing little more stability to universal service funding mechanism. In its order requiring quarterly, instead of semi-annual, reports, the Commission recently concluded that more frequent, monthly reporting "would be unduly burdensome on carriers, particularly smaller carriers." Contribution Interval Order ¶ 14. One year later, those burdens continue to exist, particularly for smaller carriers. A connections-based approach would not change this. At the same time, universal service funding would realize little to no benefit from the added reporting.

Revenue or connections forecasting is similarly burdensome, and ultimately provides only modest benefits to universal service funding. In and of itself, forecasting may not prove to be overly burdensome, but the true-ups that would be necessary to ensure adequate funding would essentially double the accounting burdens associated with universal service. Carriers would initiate accounting reviews for their forecasts and then would be required to duplicate the efforts at a later date to ensure the accuracy of the initial forecast. As the Commission explained, contribution methodologies based on projected revenues impose costs that "would outweigh any potential benefits. . . . these proposals [could] create incentives for carriers to under-report revenues or otherwise encourage carrier gaming of the contribution system [and] . . . some of these proposals would unduly increase the costs of administering universal service mechanisms." *Id.* ¶ 15. Whether based on connections or revenues, these burdensome costs would persist if forecasting methodologies are adopted by the Commission.

A collect and remit formula is equally ill advised. *See* NPRM ¶ 101. A collect and remit system is again tailored for one objective -- to relieve IXCs of their contribution obligations because of the volatility of their customer base. The Commission, however, is charged under the Act with a separate, more important goal -- ensuring the continued stability and funding of federal universal service programs. A collect and remit system fails to adequately accomplish this objective. Rather, it impermissibly shifts responsibility for universal service funding from carriers to end users, and it substantially reduces the incentives carriers may have to collect universal service fees. In all likelihood, such a system will lead to inadequate funding of the federal programs.

In addition, the concern that traffic is moving onto IP networks should not, contrary to the suggestion in the NPRM, influence this proceeding. *Id.* ¶ 13. Any discussion of voice over

IP leads to more questions then answers, including a number of legal issues and doubts about market acceptance, that counsel against relying upon voice over IP as a basis for any final policy judgments in this proceeding. For instance, the Commission has not conclusively addressed the regulatory status of voice over IP. Such a decision could impact the growth and development of this service. Moreover, at this time, the performance of IP telephony providers simply does not warrant changes to universal service to address those concerns. In the last year, domestic IP telephony providers have struggled to survive as demand for their services has not lived up to expectations. Net2Phone, a leading Internet telephony provider, has experienced highly-publicized business and management changes as the company scaled back its operations substantially.[18] Many of the largest IP telephony providers have filed for bankruptcy or have exited the market altogether. For example, ZeroPlus.com shut down it services last year and PhoneFree changed its name and business strategy in an effort to survive.[19] Dialpad, one of the largest providers of voice over IP services, filed for Chapter 11 bankruptcy in December.[20] At least some of these failures can be attributed to ongoing service quality and reliability deficiencies that continue to limit IP telephony's ability to draw customers in large volumes from

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18 *See* Sam Ames, *Net2Phone to Lay Off Nearly 300*, CNET News.com (Nov. 7, 2001) (describing personnel reductions, plans to exit unprofitable businesses, and change in voting control to IDT), *available at* http://news.com/2102-1033-275535.html.

19 *See* Wylie Wong, *Net Phone Companies in Darwinian Struggle*, CNET News.com (June 6, 2001), *available at* http://news.com/2100-1033-267979.html.

20 *See* Dialpad Communications, Press Release, *Dialpad Communications Announces Financial Restructuring* (Dec. 21, 2001) *available at* http://www.dialpad.com/company/press_2002_0311.html; *see also* Michael P. Bruno, *Nx Networks Seeks Approval to Sell Its Business*, Washtech.com (Feb. 4, 2002) (explaining that the bankrupt Internet telephony company was planning to auction its assets).

the consistent quality and superior reliability of circuit-switched telephony.[21] To the extent that IP telephony providers have been successful, it has largely been in the international market.[22] Yet the Commission's authority to impose universal service obligations on international traffic is limited, and it is likely that many of the IP Telephony providers that remain in business have a high enough percentage of international revenues that they would not need to contribute to the federal fund based on the 12 percent rule for international traffic.

Finally, especially when weighed against the serious legal risks and other costs of a connections-based approach, any benefit such an approach may have to diminish the effect of bundled offerings is distinctly limited.[23] To be sure, a connections-based approach would eliminate some of the costs carriers must incur to separate bundled revenue calculations for reporting purposes. But, similar line-drawing is involved in a connections-based approach. For example, the base factors for multi-line businesses are a form of line drawing that is not, as explained, required by the current approach to assessing contributions. Thus, while a connections-based approach addresses one form of line-drawing, it introduces another.

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21 *See, e.g., Toll Quality Remains the Biggest Bugaboo Users Say*, the Telecom Manager's Voice Report (Mar. 26, 2001).

22 *See, e.g., ITXC Receives 'Billion Minutes Served' Award at Voice on the Net Conference*, CNET News.com (Apr. 8, 2002) (explaining that ITXC is the largest U.S.-based dedicated wholesale carrier of international phone calls using the Internet as its backbone and estimating that it carries nearly 20 percent of the world's international VoIP minutes), *available at* http://investor.cmt.com/investor/news/newitem/0-9900-1028-9648260-0.html.

23 The NPRM contends that increased availability of "bundled packages of telecommunications services and [CPE] or information services" supports adoption of a connections-based contribution methodology. NPRM ¶ 13.

Moreover, the Commission only recently addressed the problem of bundled offerings under the current system.[24] The Commission made clear that carriers may elect to report interstate revenue from bundled packages by allocating the entire bundle discount to the non-telecommunications service, or they may opt to treat all of the revenues associated with bundled packages as telecommunications revenue. Bundling Order ¶¶ 50-51. Thus, the line drawing that would be avoided in a connections-based approach has already been implemented. The Commission does not provide any basis for concluding that this formula has resulted in distortions in the market.

III. TO THE EXTENT THE COMMISSION FEELS COMPELLED TO ADOPT A CONNECTIONS-BASED APPROACH, IT MUST AT LEAST ENSURE THAT ALL INTERSTATE CARRIERS CONTRIBUTE ON AN EQUITABLE AND NONDISCRIMINATORY BASIS.

As shown, the connections-based approach for universal service assessments discussed in the NPRM fails to satisfy the requirements of Sections 254(d) and 2(b) and is not justifiable on policy grounds. If the Commission nevertheless intends to go forward with such a connections-based approach, it must at least alter the proposed contribution formula.

There are other ways in which this might be accomplished. For example, the Sprint proposal takes some steps toward ensuring that interstate service providers are the exclusive source for federal universal service support by ensuring that the initial revenue base for universal service contributions is determined through the "interstate allocator" (a percentage of a carrier's interstate revenue). Furthermore, by requiring IXCs to contribute based on their presubscribed lines, the proposal comes closer to complying with Section 254 than the Commission's proposal.

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24 *See Policy and Rules Concerning the Interstate Interexchange Marketplace, et al.*, CC Docket No. 96-61, *et al., Report and Order*, 16 FCC Rcd 7418, ¶¶ 47-54 (2001) ("Bundling Order").

The Sprint proposal is not perfect; it appears to violate the equitable and non-discriminatory requirements of Section 254(d). This is because it imposes the same contribution obligations on LECs and IXCs, even after conceding that only 15 percent of LEC revenue is interstate while 74 percent of IXC revenue is interstate. *See* NPRM ¶ 60, n.150. This problem would need to be addressed before proceeding further with the Sprint proposal.

In addition, it may be possible to adopt a connections-based approach in which presubscribed long distance lines are counted as "connections" for contribution purposes. This would go a long way toward limiting the blatantly inequitable and discriminatory effects of the proposal discussed in the NPRM.

In all events, the Commission must adopt a formula that ensures that the largest providers of interstate service are the largest contributors to federal universal service programs. Of course, such a formula exists today. Over the last several years the Commission has worked steadily to improve the existing system of using end user revenues as the basis for contribution obligations. The existing system may continue to need further work, but, in all material respects, it has been upheld on judicial review. With this in mind, the Commission should not move in haste to abandon such a system.

IV. THE COMMISSION SHOULD NOT ESTABLISH MORE DETAILED RULES GOVERNING RECOVERY OF UNIVERSAL SERVICE CONTRIBUTIONS THAN ALREADY EXIST.

The Commission's existing rules for labeling charges resulting from federal regulation require carriers to provide sufficient information for consumers to make fully-informed marketplace choices without imposing overly burdensome regulations on carriers. In the 1999 Truth-in-Billing proceeding, the Commission opted not to adopt mandatory standardized labels for carrier fees designed to recover costs for federal universal service contributions.[25] Instead, it adopted a guideline "that line-item charges associated with federal regulatory action should be identified through standard and uniform labels across the industry," leaving the selection of specific uniform terms to a later proceeding. Truth-In-Billing Order ¶ 54. At the same time, the Commission recognized that carriers should have the flexibility to choose "to include additional language further describing the charges." *Id.* ¶ 56. In declining to mandate specific disclosures, the Commission reasoned that "carriers should have broad discretion in fashioning their additional descriptions, provided only that they are factually accurate and non-misleadingly." *Id.*

The Commission should not now adopt a mandatory uniform label for carriers' universal service contribution recovery line items. Uniform, mandated labeling is not needed to address the exceptional case in which a carrier violates the existing requirements. As the Commission found, it has jurisdiction to regulate line-item labels under Section 201(b). *See id.* ¶ 49. Accordingly, the Commission has enforcement tools to address any violations on a case-by-case basis. As a result, consumer protection concerns can best be balanced against carriers' need for flexibility by maintaining the current prohibition on inaccurate and misleading labeling without adopting uniform, mandated labels for these line-items. To the extent a determination is reached that further options are necessary, the Commission could adopt safe-harbor descriptions of charges that carriers could employ on an optional basis for the purpose of reducing customer confusion. *See id.* ¶ 56 (declining to adopt mandatory safe harbor provisions). However, specific language should not be mandated. Mandatory language could unnecessarily create

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25 *See Truth-in-Billing and Billing Format*, CC Docket No. 98-170, F*irst Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492, ¶ 54 (1999) ("Truth-In-Billing Order").

significant costs on carriers whose billing systems may not be equipped to detail bills in a manner exactly like the specific language the Commission might adopt.

Furthermore, although the Commission contemplates a simpler collection system in a connections-based contribution formula, the fact of the matter is that a connections-based approach will not lead to clearer end-user bills for multi-line businesses. *See* Steve Ednie Declaration ¶ 7. The Commission recognizes as much in the NPRM. *See* NPRM ¶ 51 (noting that multi-line businesses may be "better equipped" to understand fluctuations in universal service contributions). Additional Commission regulation of end-user billing, therefore, would not further any purpose except to reduce carriers' flexibility in explaining their customers' bills to them.

V. CONCLUSION

For the reasons described herein, the Commission should decline to adopt a connections-based approach for the recovery of universal service.

Respectfully submitted,

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ATTORNEYS FOR
TIME WARNER TELECOM
XO COMMUNICATIONS AND
ALLEGIANCE TELECOM

April 22, 2002

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

DECLARATION OF STEVE EDNIE IN SUPPORT OF COMMENTS OF TIME WARNER TELECOM, XO COMMUNICATIONS, INC. AND ALLEGIANCE TELECOM

1. I am Steve Ednie, Executive Tax Director, Chief Tax Officer, for XO Communications, Inc. ("XO"). My business address is 11111 Sunset Hills Drive, Reston, VA, 20190. I have more than eight years experience in the telecommunications industry, and have worked with XO since June of 1997. I am currently responsible for all of XO's international, federal, state and local tax matters. My responsibilities include the reporting and other compliance obligations related to the federal universal service fund.

2. The purpose of my Declaration is to discuss the increased costs and burdens associated with implementing the connections-based approach proposed in the

Further Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

3. The proposed connections-based system for determining carrier contributions to the federal universal service fund will significantly increase the company's overall compliance burden. The proposed contribution structure will add an additional layer of complexity to an overly cumbersome regulatory reporting environment. The proposed structure will be expensive and extremely burdensome for XO to implement and maintain.

4. If the Commission were to adopt the proposed connections-based approach, XO likely would be required to implement entirely new and complex modifications to its existing systems in order to collect and provide the required information. Currently, XO uses an electronic system for determining revenue-based fees for federal regulatory fees, such as TRS, as well as for the majority of state regulatory fees and filings. XO also maintains a manual system for complying with various line-based regulatory fees that have been implemented by some state tax and regulatory authorities. The NPRM's proposed connections-based universal service system, however, is different from all of the existing structures, and would therefore require XO to build and maintain an additional reporting mechanism. XO thus would have to maintain no fewer than three separate processes for meeting its various universal service and regulatory fee obligations.

5. The cost and effort involved in designing, implementing and maintaining the mechanisms necessary for XO to report its "connections" would be substantial. Although it is difficult at this point to precisely quantify the cost involved, the cost likely will exceed several hundred thousand dollars and could be more than one million dollars.

6. One reason this process would be so difficult and expensive to implement is that the proposed method for counting the number of connections for the federal universal service fund is different from the methods used for counting many of the other federal and state per-line fees. For example, an ISDN PRI is considered five lines for the PICC charge, while the NPRM proposes using a different methodology based on three tiers of capacity. XO would need to create a second, different counting method within the current tracking system or design and create an entirely new process to track these "connections." The new process or mechanism would likely need to be on top of our current tracking system and would be extremely manual in nature. The process would require additional resources in the provisioning, billing and tax reporting functions.

7. Not only would it be burdensome and expensive to design, implement and maintain the systems necessary to provide the information required to assess XO for its universal service contribution, but it would be similarly burdensome and costly for XO to revamp its entire end-user billing systems if XO were required to pass through its universal service costs in a manner consistent with a connections-

based assessment system. For example, over time XO has developed and sold thousands of different products that mix and match end-user connections with other types of services. As XO rolls out its products, it writes offer and billing codes for each product. In my estimation, if we had to move to a connections-based billing system for universal service, our information services department potentially would have to manually rewrite more than 100,00 existing product and billing offer codes.

8. In addition, implementing this system would add additional administrative work. The federal universal service fund codes would need to be manually added for each occurrence of each multi-line product a business customer has. The proposed connections-based end user system also would be extremely complex to administer because customers routinely add, change and drop services that could affect the universal service connection-based contribution attributable to that particular customer. Each time a customer adds, deletes or changes a multi-line product, the corresponding universal service billing code in the customer's records would also have to be adjusted.

9. Finally, complying with the requirements of the proposed connections-based system will require XO to expend significant additional resources. This results from the added administrative burden inherent in implementing a system that requires such extensive system and billing changes. It would be compounded if the Commission adopted a monthly filing requirement. Frequent filings coupled with the fact that business users frequently add, change and delete services, reporting on XO's connections would require a significant increase in manpower devoted to preparing XO's federal universal service filings.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 22nd day of April 2002.

Steve Ednie

Steve Ednie
Executive Tax Director & Chief Tax Officer
XO Communications, Inc.